ST 99-26
Tax Type: Sales Tax
Issue: Statute of Limitations Application

STATE OF ILLINOIS
DEPARTMENT OF REVENUE
OFFICE OF ADMINISTRATIVE HEARINGS
CHICAGO, ILLINOIS

THE DEPARTMENT OF REVENUE OF THE STATE OF ILLINOIS v. **"ABC CORPORATION"**, Taxpayer	No. 99-ST-0000 Claim For Refund

RECOMMENDATION FOR DISPOSITION

Appearances: Mr. Thomas C. Crooks on behalf of the taxpayer, "ABC Corporation"; Mr. Alan Osheff, Special Assistant Attorney General, for the Department of Revenue.

Synopsis:

This cause comes on to be heard following the timely protest of "ABC Corporation". (the "taxpayer") to a Tentative Denial of Claim issued by the Department of Revenue on October 29, 1998. The basis for the department's denial rests on the premise that the claim for refund is barred by operation of statute, as it was filed more than three years after the date the taxes were originally remitted. (See 35 ILCS 120/6). At issue is the question of whether the claim should nevertheless be allowed under the common law "discovery rule". Upon consideration of all argument and having reviewed

the briefs presented,[1] it is recommended that this issue be resolved in favor of the department.

Findings of Fact:

1. On or about July 25, 1998, the Department of Revenue, as is its practice, sent a statement of account entitled "Account Detail For Sales Tax" to the taxpayer. The account detail revealed "prior overpayments" totaling $11,949.55 from taxes paid in 1986, 1988 and 1989, respectively. (Taxpayer brief, Exhibit A)
2. Following receipt of the statement of account, taxpayer, through its accountants, via letter dated August 11, 1998, requested the return of the listed overpayments. (Taxpayer brief, Exhibit B – Stipulation, Par. 2)
3. The request for refund follows the latest overpayment made by almost 9 years. (Administrative Notice)
4. On October 29, 1998, the Department of Revenue, having reviewed the request of the taxpayer, issued a Notice of Tentative Denial of Claim, advising that the statute of limitations prohibited any refund. The Notice informed taxpayer that the overpayments could, however, be applied to future taxes incurred. (Taxpayer brief, Exhibit C)
5. Taxpayer, being no longer in business and unable to benefit from any credit, responded to the Notice of Tentative Denial by filing a timely written protest with the Department on November 10, 1998. (Stipulation, Par. 4, 5)

[1] The parties agreed among themselves to submit this matter on briefs, without a hearing. A stipulation of facts was filed on July 9, 1999 following submission of all supportive memoranda.

Conclusions of Law:

The basis of the Department's denial of the claim for refund as filed in this cause is found in the language of the Retailers' Occupation Tax Act, 35 ILCS 120/6, and as that section may be incorporated into other taxing acts. It states:

> If it appears, after claim therefore filed with the Department, that an amount of tax or penalty or interest has been paid which was not due under this Act, whether as the result of a mistake of fact or error of law, ***except as hereinafter provided***, then the Department shall issue a credit memorandum or refund to the person who made the erroneous payment… (emphasis supplied)
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> However, as to any claim for credit or refund filed with the Department on and after each January 1 and July 1 ***no amount of tax or penalty or interest erroneously paid*** (either in total or partial liquidation of a tax or penalty or amount of interest under this Act***) more that 3 years prior to such January 1, and July 1, respectively shall be credited or refunded***… (emphasis supplied)

Notwithstanding the affirmative language of the statute, taxpayer interposes that it nevertheless has a legal right to the refund. Arguing application of the common law "discovery rule", it is suggested that the limitation period which normally applies in situations such as the one here must be delayed owing to the lack of knowledge of a viable "cause of action". Citing the case of *Knox College v. Celotex Corporation*, 88 Ill. 2d 407 (Ill. S. Ct. 1981), taxpayer urges enforcement of the rule which has the effect of postponing the running of a limitation period "until the injured party knows or should have known of his injury". *Knox*, id. At 414. Application of the rule would thus afford 3 years to seek a refund from the time Myo Therapy, Inc. was first advised of the overpayment in July, 1998. Acceptance of this position would, in consequence, make the claim timely.

The Department, on the other hand, defends its denial by submitting that the State cannot be estopped in matters involving public revenues. It also proffers the argument that the "discovery rule" would be inapplicable here because the so-called "injury" was not caused by the Department and the taxpayer has a duty of reasonable inquiry to prevent dissipation of its rights.

The taxpayer must fail in its quest for refund for several reasons. First, even assuming the section of the statute relied upon by the Department would serve as a limitation to the exercise of a "cause of action", use of the discovery rule would be inapplicable here. The discovery rule, as advanced by the taxpayer itself, is intended to protect those who might be unaware someone else has taken an action that has caused an injury. *Hermitage Corp. v. Contractors Adjustment Co*., 166 Ill. 2d 72, at 77-78 (1995). It has seen wide application in tort and contract litigation in order to preserve an avenue of redress that would ordinarily be foreclosed due the passage of time. What is forgotten in pursuing this ground, is that the Department has taken no action at all and has caused no injury.

By the very language of the statute itself, it is through a "mistake of fact or error of law" that the mechanism for retrieval of taxes paid can be triggered. (See 35 ILCS 120/6) Therefore, it is the taxpayer's *own act* of overpayment which it seeks to rectify. As such, the lack of knowledge of its own mistake can not act to suspend or otherwise delay the operation of a limitation period which closes out any ability to correct that mistake. Moreover, since taxpayer has not pointed to nor am I aware of any legal or regulatory duty on the part of the Department to advise taxpayers of their own errors in

this vein, any *inaction* would also be of no consequence. Reliance on the discovery rule and the precepts of *Knox College,* are therefore misplaced.

Secondly, and more important, is a point that has been missed by both parties, *viz*., that Section 6 of the Retailers' Occupation Tax Act is not a statute of limitation. This section, insofar as it provides for the filing of claims for credit or refund of taxes paid, is an exclusive,[2] statutorily created means by which taxpayers can retrieve from the State monies remitted under mistake of fact or error of law. Since the obligation to pay taxes in the first instance is established solely by statute, any right that may exist to retrieval of those taxes, once paid, must also arise by statute. In the absence of such a created provision, taxes voluntarily paid cannot be recovered, as the right to a refund can only exist as it may be afforded by legislation. *Jones v. Department of Revenue*, 60 Ill. App. 3d 886 (1st Dist. 1978).

Accordingly, because the right to a refund is not accorded by common law but is strictly a creature of statute, any time element which is applied to the right is not a "statute of limitation" in the common understanding of the term. It is rather a jurisdictional requisite to the right created. In other words, the limitation period contained in Section 6 is not procedural, but instead substantive in nature. Time, therefore, becomes an integral and inseparable element of the right. The failure to accede to that element has the direct effect of extinguishing the right, not simply barring one from exercising it. To put it most succinctly, not acting within the time frame given does not just bar you from access to a right, it removes the right itself.

[2] 35 ILCS 120/6c makes the legislative intent of this clear by its own terms, stating: "Claims for credit or refund hereunder must be filed with and initially determined by the Department, the remedy herein provided being exclusive; and no court shall have jurisdiction to determine the merits of any claim except upon review as provided herein." (emphasis supplied)

The Illinois Supreme Court has addressed this issue in the context of denying a party the right to pursue administrative review of a departmental decision when the complaint was not filed within the 35-day period set by statute. (See 735 ILCS 5/3-103) In *Fredman Bros. Furniture v. Department of Revenue*, 109 Ill. 2d 202, 486 N.E. 2d 893 (1985), the court observed:

> …[W]e must recognize that a significant difference exists between statutes of limitation and statutes that both confer jurisdiction on a court and fix a time within which such jurisdiction may be exercised. Statutes of limitation only fix a time within which the remedy for a particular wrong may be sought. (See *Smith v. Toman*, (1938), 368 Ill. 414.) They are procedural in nature (citations omitted) and are not designed to alter substantive rights. *** On the other hand, statutes which create a substantive right unknown to the common law and in which time is made an inherent element of the right so created, are not statutes of limitation. (citation omitted) Such a time period is more than an ordinary statute of limitation (citation omitted) it is a condition of the *** liability itself and not of the remedy alone. *** It goes to the existence of the right itself. (citation omitted) Such a provision is a condition precedent to the plaintiff's right to seek a remedy. (citation omitted) Such statutes set forth the requirements for bringing the right to seek a remedy into existence. They do not speak of commencing an action after the right to do so has accrued. They are jurisdictional, not mandatory. (***Fredman***, at 209-10)

See also, *Pickering v. Human Rights Commission*, 146 Ill. App. 3d 340 (2nd Dist. 1986).

From this explanation, it is clear that the three-year period within which applications for credit or refund can be made is an absolute, and cannot be altered by the fact that the taxpayer was unaware until recently that any overpayment was made.

In analyzing this issue, we must also recognize that the three-year provision as contained in Section 6 is not phrased as an affirmative duty upon the applicant to file as is common with most, if not all, tort and contract actions and their respective limitation periods. (See 735 ILCS 5/13-101, et seq.) Rather, the language of the statute under study imposes a specific prohibition upon the State, which under the legislative scheme

eliminates the ability to honor or otherwise consider any application for credit or refund once the established time period has lapsed. As the limitation imposed is a direct restriction upon the government's ability to act and not the applicant's duty to file, it is jurisdictional and not procedural. Therefore, the "discovery rule" has no relevance to this proceeding and can provide no relief in this instance.

On the basis of the above, it is recommended that the Tentative Denial of Claim for refund as issued in this cause be affirmed.

Respectfully submitted:

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Richard L. Ryan
Administrative Law Judge

Date: 12/3/99